TO BE ARGUED BY:
DEBORAH KOPALD
TIME REQUESTED: 15 MINUTES

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION: SECOND DEPARTMENT

Docket No. 2021-01543

In the Matter of the Application of

DEBORAH KOPALD,

Petitioner-Appellant

For a Judgment pursuant to Article 78

-against-

THE TOWN OF HIGHLANDS, NEW YORK,
THE NEW YORK POWER AUTHORITY
Respondents-Respondents

ORANGE AND ROCKLAND UTILITIES, INC.,
Respondent

REPLY BRIEF FOR PETITIONER-APPELLANT

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POINT I

NYPA CONCEDES APPELLANT'S CLAIM THAT THE TWO CONSULTING CONTRACTS PRECEDING THE ACTION THE TOWN TOOK TO APPROVE STREETLIGHT FIXTURES DO NOT BIND THE TOWN TO A FUTURE COURSE OF ACTION, WHICH MEANS THEY DO NOT COMPRISE ACTIONS SUBJECT TO SEQRA

ERGO, THE TOWN OF HIGHLANDS, WHICH ACKNOWLEDGES THE NON-BINDING NATURE OF THE CONSULTING CONTRACTS, MISREPRESENTED THAT APPELLANT MISSED THE DEADLINE FOR ENVIRONMENTAL REVIEW OF ANY ACTION IT SUBSEQUENTLY TOOK

There were exactly three votes taken by the Town of Highlands on matters related to lighting discussed in this appeal. The first two were votes taken by the Town Board on a consulting contract that had two parts:

1) Master Cost Recovery Agreement, "MSCRA" (signed July 23, 2019);R1008
2) Authorization to Proceed ("ATP") (fully signed October 3, 2019; R1049[1]

The New York Power Authority ("NYPA")' **admits** on page 4, ¶4 of Attorney Flynn's opposition brief precisely what Petitioner-Appellant argued to this Court:

> MCRA does not specifically contemplate *any particular energy services project*
>
> (Emphasis added)

1 Counsel Matsler for the Town of Highlands refers to it with an April date, but the Town did not sign it until October 3, 2022.

Accordingly, the MSCRA (or MCRA as NYPA terms it) is not a challengeable action because it "does not commit the agency to a definite course of future decisions"/affect the environment 6 NYCRR §617.2(b)(2)(3). Note-ably, **the ATP** which allows NYPA to start the consulting process of suggesting possible (as of then still undefined) projects (as laid out in the MSCRA) **does not commit the Town to a definite course of future decisions either** or any permanent decision.

To constitute an action pursuant to 6 NYCRR §617.2(b) a contract must commit the agency to a definite course of future decisions/affect the environment. **No party rebutted or attempted to rebut this contention**, which is supported by *Town of Woodbury v. Cty. of Orange*, 114 A.D.3d 951, 981 N.Y.S.2d 126 (2014), and *E. End Prop. Co. No. 1, LLC v. Kessel*, 46 A.D.3d 817, 851 N.Y.S.2d 565 (2007). No contrary authority has been offered. See discussion at Argument Point I of Appellant's moving brief pp. 26-31. Neither Respondent denies that the ATP does not commit the Town to a definite course of future decisions.

Hence the ATP's operationalization of the MSCRA is not actionable under SEQRA and Petitioner-Appellant could not have challenged the ATP under SEQRA **because no step affecting the environment and that committed the Town to a definite course of future decisions was then taken (on September 23, 2019)**.

Not only did the Respondents not attempt to rebut this point, **NYPA in fact explicitly agreed with Petitioner** that neither the MSCRA nor the ATP bind the Town to any course of action! Page 8, ¶4- page 9, ¶1 of NYPA Counsel Flynn's brief reads:

> The MCRA describes the general framework for any particular energy services project that the Town and NYPA may eventually enter into during a 10-year period. R 1079. As recognized by Petitioner in her brief, the MCRA does not contemplate any specific energy services project, including the replacement of street lights by the Town, and as such the MCRA is properly classified as a Type II action under SEQRA and requires no further action.
>
> **The Authorization to Proceed, while focusing on the Town of Highlands Street Lights similarly does not commit the Town to any specific course of action** a fact recognized by Petitioner in her brief. Pt. Brief p.14
>
> (Emphasis added)

NYPA's correct admission underscores the fatuousness of both Respondents-Respondents' opposition to this appeal. NYPA has thus CONCEDED that there was no environmental determination the Petitioner could have challenged with respect to the ATP or the MSCRA.

The Town of Highlands engages in three deceptions to this court- first. that Petitioner-Appellant even attempted to nullify the ATP pursuant to SEQRA in this Article 78 challenge; second that it would have been lawful to do so; and third, (by

implication) that she missed the statutory deadline to challenge the change to LED lights/ systems.

Subsequent to the signing of the ATP, the Town Board met with NYPA's consultant Guth DeConzo which recommended a menu of potential options for the streetlighting fixtures. The portion of the memo entitled "Open Discussion regarding Design" discussed "replacing the fuses and fuseholders on the cobrahead fixtures", which is likely a precondition for removing the vapor lighting to replace with some LED's. The memo goes on to discuss how the system currently involves dusk to dawn photocells, but explains that switching to lighting control nodes are necessary for NYPA to service lights going forward:

> …..to be eligible for NYPA's ongoing maintenance agreement the municipality must have lighting control nodes, not dusk to dawn photocells

Either system can have a wireless so-called "smart" component, which as explained in Appellant's moving brief, create microwave radiation exposures.

The Guth DeConzo materials also contained data sheets for different lights of different color temperatures (which have different environmental implications) and a recommendation to purchase streetlight fixtures from O&R- the ownership of these fixtures was a necessary precondition to taking an action to select any future

light or lighting system with NYPA. The Town still has not voted to approve any of these specific options[2].

Town of Highlands elected to act on a recommendation out of the MSCRA/ATP consulting agreement on April 27, 2020 and buy the streetlight fixtures from O&R, at the height of the pandemic when almost no members of the public attended meetings, and Petitioner-Appellant did not know for certain if the Town had voted on any other recommendation by Guth Deconzo since the December 9.

Therefore, to make sure she was challenging all actions it might have taken in the four months (plus time tolled due to Covid) prior to the date she filed the petition, she specifically stated in her petition (R17-R18) that in addition to challenging the resolution authorizing the purchase of the streetlighting fixtures with O&R, she was challenging

- Any contract related to the Resolution that was signed by the Town of Highlands and O&R since December 9, 2019 or whatever date is deemed four months ago plus the tolling from the Governor's Executive Orders ("the control date").
- Any contract and/or agreement that was signed between the Town of Highlands and the New York Power Authority ("NYPA") since the control date related to and/or pertaining to the project described in the

2 NYPA's claim at page 6, ¶1 that the Town is not currently contemplating these bells and whistles is beside the point; they haven't voted to move forward with any project recommendation other than the purchase of the fixtures, yet, and it doesn't mean they will not affirmatively vote to retrofit the system into a quasi-cell tower-like system in the future.

Verified Petition July 27, 2020 (17-34) Resolution that operationalizes this project, that is to say, has to do with the financing of the project and/or the maintenance of the project

- Any contract and/or agreement related to the project described in the Resolution that was signed between NYPA and O&R since the control date.
- Any contract and/or agreement related to the Resolution that was signed by NYPA, O&R and the Town of Highlands") since the control date.

See also WHEREFORE clauses starting at R0032.

Petitioner-Appellant made very clear that she was NOT challenging anything before December 9, 2019, a date that was after the signing of the MSCRA and the ATP and that represented the Kick-Off meeting to discuss options.[3]

Justice Vazquez-Doles thus clearly erred at ¶2 at R0010 when she concluded:

> The Petitioner demands nullification of the separate actions taken by the Town on September 24, 2019 and April 27, 2020.

It is thus fatuous of Respondent-Respondent Town of Highlands' Counsel Matsler to assert that Her Honor's ruling was understandable, and to accuse Petitioner-Appellant of "back-pedaling" in this appeal.

This respondent points to *no place* in the petition where petitioner-appellant requested that the MSCRA/ATP to be overturned. (The ATP was authorized to be

3 The Town's reference to R0031 misrepresents that Appellant was referring to the ATP; again, given the possibility of the existence of other contracts signed that emanated from the December 9, 2019 kick-off meeting, she had to ensure they were encompassed in the Article 78 challenge.

signed on September 23, 2019 and fully executed on October 3, 2019). Instead, petitioner-appellant drafted her causes of action to encompass all contracts that could have been signed or voted on in the interim.

Again, no other contracts were signed other than the purchase of the streetlight fixtures; and again, the ATP allows NYPA to start recommending projects in the form of Customer Project Commitments ("CPC's") and Initial Customer Installation Commitment ("ICIC")[4].

The Supervisor himself then understood that the vote his board took on September 23, 2019 was a vote to investigate future options. He correctly referred to the ATP as a "document ***regarding*** comprehensive Street Lighting Upgrade" (R0941). He did not say "a document *authorizing* a comprehensive Street Lighting Upgrade."

Since no definite course of action was authorized, no action was taken that could be reviewed under SEQRA, and Petitioner-Appellant did not and could not mount a SEQRA challenge to the ATP; the ATP did not constitute a decision to engage in any specific lighting installation. It does not define or mandate any

4 Respondents both freely admit that under this consulting contract, the Town has to agree to move forward with a particular project (and vote to do so), before NYPA starts work on such a contract. If the Town moves forward with design and bidding, they are not obligated to move forward with the project and would return some funds pro-rated for bidding work by NYPA.

specific project. The Town has not made any decision on what color-temperature light it will purchase either from NYPA or from another source. (LEDs vary in environmental effect). The Town made no decision on what types of hoods would go over the lights which can greatly control the spread of the light so it is more localized or on any other mitigation system. The Briefing Book explains that the higher the color-temperature, the worse the environmental effect. (R37-R59).

Letters from New York doctors Rosenthal and Kestenbaum (to the Nassau County legislature) explain how the effects of higher color-temperature blue-white LED's are worse than lower color-temperature blue-white LED's and that the effects from any blue-white LED's are much worse than much lower color-temperature (e,g, yellow, orange or red) LED's, which the Town could ultimately choose (R52-R58) (and which would mimic some aspects of current vapor lights.

Therefore, Her Honor erred at page 2 of her order ¶1 at R0008:

> Petitioner is also challenging the Town's decision to convert the street lighting to LED lamps, made on September 24, 2019.

The Town did not then make a decision to convert streetlights it did not then own to LEDs and certainly not to any specific type of LED and/ or lighting system and

in fact still has not done so[5]. They then made a decision to approve the start to a consulting arrangement to investigate options.

Instead, it is the Respondent-Respondent Town doing the "back pedaling", not the Petitioner-Appellant. If the Town had made such a decision then, it would have committed them to a definite course of future action, but NYPA explicitly stated that neither the MSCRA nor the ATP, to which it is a counterparty, commit the Town to a definite course of future action.

Since Petitioner-Appellant could not have lawfully mounted a SEQRA challenge to something that does not commit the Town to a definite course of action, she did not violate the Statute of Limitations to challenge actual actions taken with regard to lighting including the purchase of the fixtures herein and any future bulb purchases. NYPA's first argument, that Appellant did not challenge the ATP is utterly beside the point, and not in dispute.

Thus Justice Vazquez' Doles ruling amounts to a Heads- the Town wins! Tails- concerned citizen loses! unauthorized express pass for the Town to obviate any SEQRA review of an eventual lighting and light/system purchase.

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5 In the time since she filed the Petition up to the present day, Petitioner-Appellant has regularly filed Freedom of Information Law ("FOIL") request with the Town and found that they had engaged in no other contracts with NYPA. In fact at one Town Board meeting, when she asked in public if they had signed a further contract, Town Board member Richard Sullivan said they had not and that it was because of her lawsuit.

Since the ATP could not be reviewed under SEQRA (it presents no specific project nor obligates the Town to any project), the lower court erred in ruling Petitioner-Appellant was time barred from having actual actions the Town takes emanating from the ATP now or in the future reviewed under SEQRA.

To reiterate, any future recommendations such as the ones made by Guth Deconzo at the kick-off on December 9th that would involve lighting contracts with NYPA did not obligate the Town to select them or stay with them once bid. The Town *also could not possibly vote to convert fixtures (that they did not then own) to LED lighting* ("then" being the time the ATP was authorized) and had to affirmatively commit to buying the fixtures before beginning the process of choosing lighting and light systems with NYPA to go into and onto the fixtures.

The vote to purchase the fixtures, a necessary pre-condition to taking an action on lights and a lighting system, did not occur until April 27, 2020 and Petitioner-Appellant timely challenged same. That is the only vote she challenged as it was the only action (something that can be environmentally reviewed) taken on a streetlighting project.

The other major misrepresentation by the Respondents on their alternate "timeline" of approvals is that any future decision to purchase a specific light to go

into the fixtures was already pre-approved by NYPA's 2018 SEQRA review before it engaged in business with the Town.

On this issue, Appellant again refers this Court to case law in her moving brief, Point 5. See again especially : *Price v. Common Council of City of Buffalo*, 3 Misc. 3d 625, 773 N.Y.S.2d 224 (Sup. Ct. 2004): (Id. 3 Misc.3d at 630) and *Brander v. Town of Warren Town Bd.,* 18 Misc. 3d 477, 847 N.Y.S.2d 450 (Sup. Ct. 2007) (Id. 847 N.Y.S. 2d at 4856.

Besides the fact that specific new lights have not been selected for purchase yet, the Town must be lead agency on this future decision, and any pre-typing by NYPA of their inventory of lights that NYPA peddles to others has no preclusive effect on the Town, which must make its own SEQRA determination of any future lights/ lighting system purchase.

Therefore, Petitioner-Appellant did not violate the statute of limitations on a future determination by the Town on lights and lighting systems…. that haven't even been made yet.

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6 Counsel Flynn misrepresents Appellant's moving brief point 5 in NYPA's brief footnote 1. NYPA's determination on lights it independently purchased prior to engaging in talks and then a consulting contract with the Town of Highlands do not constitute an action taken by the Town of Highlands. Appellant's point 5 challenged the relevance of any independent action taken by NYPA, since it is non-binding upon the Town and asked for the order to be overturned in full. NYPA's SEQRA determination on something the Town has not purchased yet is IRRELEVANT to the matters in this Article 78.

It should also be noted that notwithstanding a generalized desire expressed to have more energy-efficient lighting; Appellant never opposed all LED lights, but pointed out to the Town that LED lights are not all blue-white color temperature which are bad for humans and the environment, and that the Town could select a more environmentally friendly yellow- orange-red hued LED light.

The ones in this lower color-temperature-range that have the blue-white daylight frequencies stripped out are safest for humans and animals and as explained in the briefing book have been rolled out in Flagstaff, AZ and the national parks. The Town can consider options made by NYPA, **but the Town is not bound to purchase any system from NYPA**.

Appellant gave the Town some options for vendors of these safer LED's at R38, footnotes 3 and 4. This page explains the specifications for the different lights and the briefing book goes on to show how the higher color-temperature blue-white ones negatively affect human sleep rhythms.

Even if the Court were to somehow accept the lower court's finding that the Town affirmatively decided to move forward with LED's, despite the absence of any such decision on the record, LED's comprehend many different types of bulbs with different types of light emissions, systems that can shield the light so it

doesn't spread so widely and systems that can shield the deleterious high-frequency transients caused by LED lights (documented at R43-R45)- etc.

The devil is in the details, and in the absence of same, and any overall implied intent to "go with LED's" (in the event the Town would later gain control of the fixtures, which it had not done in 2019 and did not do until 2020)…. investigating them in a non-binding contract could scarcely have been reviewable, since no specific system had been articulated.

Note-ably, **not only did the Town not commit itself to the purchase of LED lighting**, but **the Town did not even vote to obligate itself to conducting business with NYPA**, which means it can choose a safer LED from a different vendor and still be more energy-efficient. (It also did not vote to obligate itself to purchasing any LED lights and could still vote to purchase surplus vapor lighting to replace any vapor bulbs that break and not convert to LED).

Thus, Justice Vazquez-Doles erred at ¶2 at R0010 when she concluded:

> Here, petitioner contends in their petition that the Town of Highlands violated SEQRA twice--when it entered into a contract with NYPA as of September 24, 2019 to install LED lights without any SEQRA review, and again when it resolved to enter into an Agreement with O&R to purchase street lighting facilities.

The Town has only violated SEQRA once (with the purchase of the streetlight fixtures (facilities) and that is what Petitioner-Appellant challenged.

If the Town decides to choose a new type of light and a system to control them in the future, it such should consider all mitigating options including a low-color temperature LED, light-dispersing hoods and high frequency transient filters which it can obtain from another vendor upon considering all options.

Ipso facto, the first action to purchase the streetlight fixtures (and only action taken by the Town) is the first step taken piecemeal in furtherance of an eventual new lighting project that has not been determined yet. The whole project should be decided together (See Point III below).

POINT II

RESPONDENTS-RESPONDENTS' CITATION TO GOVERNOR HOCHUL'S PRESS RELEASE IS IRRELEVANT NOT JUST BECAUSE IT IS DEHORS THE RECORD AND LATER IN TIME, BUT BECAUSE THE EXECUTIVE BRANCH'S STATEMENTS HAVE NO PRECLUSIVE EFFECT AND ARE MERELY ANOTHER ATTEMPT WITH NO LEGAL BASIS TO SHORT-CIRCUIT ENVIRONMENTAL REVIEW OF ANY FUTURE PURCHASE OF A NEW LIGHTS/LIGHTING SYSTEMS TO GO INTO THE STREETLIGHTING FIXTURES THE TOWN HAS JUST PURCHASED.

Governor Hochul's September 27, 2021 press release that the state has now replaced 286,000 streetlights with LED fixtures, is dehors the record and occurred after the matters under appeal (Page 5, ¶1, Town opposition brief).

Appellant acknowledges the Town's contention that Governor Cuomo's 2018 State of the State Address made reference to "NYPA's Smart Street Lighting Program [which] seeks to replace at least 500,000 streetlights with energy efficient LED technology by 2025".

However, this is not a program that the State has mandated upon Town. NYPA is not a government agency; rather, it is a public benefit corporation ("PBC") which offers LED technology to agencies. Wikipedia's entry on New York state public benefit corporations correctly explains that this is a distinction with a difference:

> Public Benefit Corporations operate like quasi-private corporations, with boards of directors appointed by elected officials, overseeing both publicly operated and privately operated systems. Public-benefit nonprofit corporations share characteristics with government agencies, but they are exempt from many state and local regulations. Of particular importance, they can issue their own debt, allowing them to bypass limits on state debt contained in the New York State Constitution. This allows public authorities to make potentially risky capital and infrastructure investments without directly putting the credit of New York State or its municipalities on the line.
>
> The growing influence of public authorities over state and local financing, coupled with their ability to avoid regulations applicable to government agencies, has led to calls for reform. Some reforms were passed in the Public Authorities Accountability Act of 2005[7]. The New York State Authorities Budget Office, in their 2018 annual report, noted that there were 47 state authorities and 531 local authorities, including 109 IDAs and 292 not-for-profit corporations created locally, that they provided oversight for in New York State.

There has been no official finding by the State of New York about the tradeoffs between energy efficiency and health of LED lights and no such accounting has been made by the under-regulated quasi-corporate NYPA. (As reiterated in Point I above and Point 1 in the moving brief, no previous independent decision by NYPA has any preclusive effect upon the Town.

7 NY Uncon Laws § 6387, NY Pub Auth § 2 et seq., NY Leg § 30, NY Exec § 51 et seq., NY Envir Conser § 15-2137

Petitioner-Appellant's Briefing Book clearly documents the problems documented in many studies and by many authorities. (Briefing Book: R37-59; Exhibits: R60-R342). This week, Physics.org ran featured yet another such study: The dark side of LEDs: Suppression of melatonin by blue light (phys.org) Amelioration of climate change/ energy efficiency must be balanced with other environmental health risks.

Indeed Petitioner-Appellant is noted for her public advocacy against inappropriate technology rollouts- some of which have been evangelized by various government officials. Note-able examples include smart meters, which have been rejected by New Mexico and Kentucky (where the AG, who is now the Governor, wrote a brief in opposition to them) and 5G so-called small cells which are the subject of legal disputes throughout the country (the New York Senate and Assembly were successful in stopping the Governor's efforts to strip local zoning and planning over same in 2018).

The problem of governments encouraging (but not mandating) certain technologies, is they tend to suppress the negative externalities. The common problem is **solving one problem without considering the other problems the "fix" creates**. One visceral example of this is Germanwings Flight 9525: after 9/11, cockpit doors were reinforced to keep terrorists out; however, no government

authority anticipated the terrorist actually being the pilot at the controls when the decision was made to reinforce the doors to seal pilots in.

Furthermore, the Governor's announcement references the use of the LED lights in Syracuse, Albany, Rochester, and White Plains. These are big cities, unlike the Town of Highlands, which is a small town nestled in the Palisades Park and along the Hudson River, where high-color temperature LED lighting used in cities is inappropriate. See again: *Town of Bedford v. White*, 204 A.D.2d 557, 611 N.Y.S.2d 920 (2nd Dep't: 1994), Id. 204 A.D.2d at 559.

Certainly, a lower-color temperature orange LED would be more appropriate for the Town of Highlands; this is an LED, just a better one that NYPA is offering.

The policy that is being encouraged (not mandated) by the Governor's office and promoted by PBC (NYPA) is not dispositive of anything. The comments on the website are mere bromides:

> SMART city technologies that meet a city's individual needs, is a win-win for the state and our customers as it reduces energy use, improves safety and municipal government efficiency, and saves money.

Smart technology involves pulse-modulated microwave radiation of the type Petitioner-Appellant is sensitive to. It is not safe, and it is being discouraged by consortia of scientists, such as those that signed the International 5G appeal.

Furthermore, in the middle of the Governor's website, under the heading **Smart Street Lighting NY: Energy Efficient and Economically Advantageous** (See where it says: To learn more about Smart Street Lighting NY and other innovative NYPA programs, visit the NYPA services website. From there, click on Smart Street Lighting New York), embedded therein is NYPA's P.R. video touting the Governor's press release about the rollout of the 286,000 streetlights. Most note-ably- before sending the user to this page, the Governor's website warns:

> The State of New York does not imply approval of the listed destinations, warrant the accuracy of any information set out in those destinations, or endorse any opinions expressed therein. External web sites operate at the direction of their respective owners who should be contacted directly with questions regarding the content of these sites.

So, **the Governor's office** has subcontracted the P.R. for its press release to NYPA and then **warns the viewer that they won't stand by the accuracy of the claims made by NYPA therein!**

In the video on the Smart Street Lighting New York page, NYPA discusses the pairing of the "Internet of Things" ("IOT") and public Wi-Fi and cell towers on smart streetlighting- exactly the kind of things that create a public access nightmare for the Appellant. When NYPA says the Town isn't "choosing" these options, the Town has not made any legal determination on what options it will choose to go on the fixtures.

This reinforces the problem with the lower court's finding; absent reversal, the Town would be able to put wireless systems onto the streetlight fixtures of the type the International 5G Appeal warns about and circumvent review. Cell towers and transmitters are subject to SEQRA review for visual aspects, create issues for disability access, sometimes involve noisy fans8 that can affect the environment or humans, involve batteries that can drip and create hazmat issues[9], and require pesticides to be sprayed at the base of the pole[10] that would necessitate environmental review. These are all things that would be particularly problematic in a Town nestled in the Palisades state park and along the Hudson River.

Fundamentally, with NYPA, which is the counterparty to the ATP, having admitted that prior to the purchase of the streetlight fixtures, the Town of Highlands took no vote that would commit the Town to a future course of action, (which means they are admitting that the Town did nothing actionable under SEQRA that could have triggered an environmental review), the Town linked to

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8 "A City Planner's Abbreviated Response to Comments on Streamlining Deployment of Small Cell (And Not-So-Small-Cell) Infrastructure, Omar Aisry, AICP, FCC Docket #16-421. February 12, 2017, page 1

9 See: Regulating Wireless Siting and Leasing Wireless Sites: Protecting Local Interests: Joseph Van Eaton, Esq. Gerard Lavery Lederer, Esq. Best, Best and Krieger LLP, CLE Class, Federal Bar Association.

10 See: discussion at page 4, (reference to soil sterilizer at base of pole with wireless transmitter) City of Orlando, Staff Report, Appearance Review Board

Governor Hochul's website in its appeal to support its piecemeal march to changing the system without engaging in any environmental review of it whatsoever.

Notwithstanding the political pull of the Governor's desires, the Town must perform its own SEQRA review and Justice Vazquez-Doles is wrong to thwart it by claiming Appellant missed her opportunities when no action had previously been taken where she could mount such a challenge. The absurdity of her order and the Respondents' Orwellian contention is that they can sign a contract that does not take an action, that Appellant cannot challenge and that this can then bar her from challenging subsequent contracts that do affect the environment.

Point III

THE PURCHASE OF THE STREETLIGHT FIXTURES WITH OR WITHOUT A TYPE II DESIGNATION CONSTITUTES UNLAWFUL SEGMENTATION

To further confuse this court, Town's Counsel Matsler tries to make it seem as if the April 27, 2020 resolution involves the purchase of fixtures and LED streetlights from Orange and Rockland Utilities, Inc. ("O&R"). They purchased these streetlights *as is* with the non-LED sodium vapor or mercury vapor lights, that Appellant contends are tried and true and safe. A mere handful that broke were replaced with LED, which Petitioner-Appellant did note to the court.

Appellant also takes issue with Counsel's characterization of the Town's contract with O&R[11]. Page 9, ¶2 of the Town Brief, states

> The Town's April 2020 Resolution, however was for the purchase of existing O&R streetlights along Route 9W….

Even if this were true, the Town's statement that the Petitioner could not possibly walk a half-mile from her house (and thus be affected by them) is fatuous.

In any event, the contract does not specify the *location* of the light fixtures and as such cannot be assumed to only be on 9W and not on Petitioner's street,

11 Also, as indicated in Point I, Town mischaracterizes Appellant's Third Cause of Action and Petition ¶3 which were drafted to include any other contracts signed after the consulting arrangement started that she did not then necessarily know about. It is also incontrovertible, that the Town is buying the streetlight fixtures so they can change the lights and lighting system; otherwise, there would be no reason to change the status quo (O&R will not replace the lights in one fell swoop).

Forest Hill Road, absent a hearing. At no point in the record does the Town swear to the location of the fixtures it purchased. Nowhere in the contract does it say that the Town was buying some, but not all of the fixtures in the Town.

Page 10 of the Town's brief reads:

> ….A description of the existing O&R street lighting equipment is given in the June 2020 purchase contract on page 4. It includes "luminaires, lamps, mast arms, their associated wiring, electrical connections, and appurtenances." The existing poles are excluded from the contract sale. (Contract §2.3(a), p.5, R0959).

§2.3(a): the poles are obviously still going to be controlled by the electric company so they can access them to service electric wires. However, the point for consideration of Type II SEQRA exemptions is the street lighting equipment in question is a fixed real estate asset that is attached to the fixed electric pole.

There is still no Type II exemption for 6 NYCRR §617.5(c)(1)(2) because the purchase of these fixed assets do not constitute "maintenance or repair involving no substantial changes in an existing structure of a facility" or "replacement, rehabilitation or reconstruction of a facility".

There is also no Type II exemption, pursuant to 6 NYCRR §617.5(c)(31) "purchase or sale of furnishings, equipment or supplies". Petitioner-Appellant reiterates definitions of same from her moving brief, point 5. Counsel Matsler attempts to break down the fixtures into their component parts; this would be like

buying fixed real estate assets like cell antennae and then trying to get an exception because they contain a transducer, and various microchips.

Again fundamentally, as Appellant already explained, even if the fixtures do qualify for the Type II exemption if that were the only action being taken in furtherance of a yet to be determined light/ light system purchase, the fixture purchase is step 1 in the eventual switch to a new system and the purchase of new bulbs (otherwise there would be no reason to transfer ownership from O&R).

NYPA has already indicated it will not maintain sodium and mercury vapor lights that came with the streetlight fixtures in any eventual maintenance contract the Town signs with it.

The meeting minutes with NYPA from December 9, 2020, are clear that NYPA directed the Town of Highlands to purchase the streetlight fixtures from O&R as a necessary pre-condition to potentially engaging in a purchase with NYPA in the future. This would be a necessary precondition to engaging with any other vendor, including one that sells more environmentally-friendly orange LED lights.

Assuming the Court agrees with Petitioner-Appellant's unrebutted contention, that the MSCRA/ATP was not an action she could have challenged pursuant to SEQRA because *it did not commit the Town to a definite course of*

action, the purchase of the fixtures without an approval for the follow-on contract intended with NYPA for the replacement of the bulbs and any other wireless accoutrements (control nodes, IOT or so-called small cell towers, as contemplated by the kick-off discussion with Guth DeConzo) constitutes a textbook case of unlawful segmentation of the overall project.

Contrary to the Town's Brief, page 16, ¶1, there is NO EXCEPTION for any future stage of the project as so-called "green technology". Petitioner-Appellant refuted this contention, in her Affidavit at R900:

> Furthermore, lest the Respondents try to misrepresent that LED lights are "green infrastructure" and thus subject to Type II; green infrastructure is specifically defined in in 6 NYCRR § 617.2(r) thus:
>
> > r) **Green infrastructure** means practices that manage storm water through infiltration, evapo-transpiration and reuse including only the following: the use of permeable pavement; bio-retention; green roofs and green walls; tree pits and urban forestry; storm water planters; rain gardens; vegetated swales; downspout disconnection; or storm water harvesting and reuse.
>
> The term has nothing whatsoever to do with streetlighting.

The Town did not oppose Petitioner-Appellant's contention in the Record and Justice Vazquez Doles did not address it in Her Honor's order.

Appellant's Point III in her moving brief explains that even if the court agreed that by itself the purchase of the fixtures would constitute a Type II action,

it could still constitute an unlawful segmentation. (Thus, Town's Point III at page 18 of its brief is wholly without merit). See again 6 NYCRR §617.3(g)(1):

> *Considering only a part or segment of an action is contrary to the intent of SEQR*

and *Maidman v. Inc. Vill. of Sands Point*, 291 A.D.2d 499, 738 N.Y.S.2d 362 (2002) Id. 291 A.D. at 501 and the New York State Department of Environmental Conservation's ("NYSDEC") SEQR handbook at page 54[12]:

> All known or reasonably anticipated phases of a project should be considered in the determination of significance. If later phases are uncertain as to design or timing, their likely environmental significance can still be examined as part of the whole action by considering the potential impacts of total build-out

[12] NYSDEC SEQR HANDBOOK
https://www.dec.ny.gov/docs/permits_ej_operations_pdf/seqrhandbook.pdf

Point IV

PETITIONER HAS STANDING TO BRING THIS CHALLENGE; RESPONDENT TOWN SHOWS NO AUTHORITY THAT REQUIRES SCIENTIFIC PROOF OF HER ALLEGATIONS;

EVEN IF SHE DID NOT DEMONSTRATE STANDING TO CHALLENGE THE PURCHASE OF THE FIXTURES IN THIS ARTICLE 78, SUPREME COURT'S ERRONEOUS FINDING THAT APPELLANT HAD NO RIGHT TO MAKE AN ENVIRONMENTAL CHALLENGE OF LIGHT OR LIGHTING SYSTEMS MUST BE VACATED ON THIS APPEAL SINCE THE TOWN NEVER PREVIOUSLY TOOK AN ACTION ON SAME THAT WAS SUBJECT TO ENVIRONMENTAL REVIEW.

Even if standing were not demonstrated in this Article 78, the portion of the order claiming that Petitioner failed to challenge any so-called decision to purchase LED lighting is faulty and must be reversed pursuant to Point I (and Point II which underscores that actual decision about what lights and lighting systems to take require environmental review).

No action can be taken by the Town Board absent a SEQRA review pursuant to 6 NYCRR §617.3(a)[13]. No SEQRA review could have been made of something that was not an action, since it did not commit the Town to any specific action pursuant to 6 NYCRR §617.2(b)(2)(3). (The Court cannot claim that a consulting arrangement that Petitioner was legally prohibited from challenging on

13 6 NYCRR §617.3(a) (a) No agency involved in an action may undertake, fund or approve the action until it has complied with the provisions of SEQR.

environmental grounds means there cannot be a review of a project later chosen as a result of the consulting agreement that does have an environmental implication.

However, Appellant does have standing; she alleged that she walks at night, whereas most people who walk in the neighborhood do so during the day or use the gym; Appellant explained that she does so because it is more quiet at that time and others aren't walking out so she has alone time to herself. R 1082, ¶7. The Town of Highlands is not that large, and Respondents' assumption she does not walk half a mile from her home is false and inapposite as there is no bright line rule as to distance; furthermore as stated, Respondent has not proven that the contract in question does not encompass the streetlighting fixtures on residential streets, and Appellant asserts that it does.

Appellant's use of a public right of way to enjoy her walks in the night air is sufficient to establish standing. The fact that many persons may suffer the same environmental injuries is not fatal to Appellant's standing. See *Sierra Club v. Village of Painted Post*, 26 N.Y.3d 301, 43 N.E.3d 745 (2015), 26 N.Y.3d at 311 (citing *Matter of Ass'n. for a Better Long Is. Inc., v. New York State Dept' of Envtl. Conservation*, 23 N.Y.3d 1, (2014)) (fact that multiple residents will suffer direct injury does not deprive person so situated of standing to sue so long as injuries are different from those most members of the public face; these injuries need not be

unique). However as Appellant, stated, because of her night walks, her injuries are unique in any event.

See also: *Rosch v. Milton Zoning Bd. of Appeal*, 142 A.D.2d 765 766-67 (1988) (impact on "beauty and character of property, traffic and noise" sufficient to support standing for petitioner residing one-quarter mile from site). This is an Appellate case and should be considered before the Suffolk County case offered by the Town (*Gasoline Heaven at Commack, Inc. v Town of Smithtown Town Board*, 2013 NY Slip Op. 33095(U) (2013). (The injury complained of was economic harm, and that is not an interest that was protected by the Zoning law in question in that case in any event.

See in particular *Shinnecock Neighbors v. Town of Southampton*, 53 Misc. 3d 874, 37 N.Y.S.3d 679 (2016):

> Since it appears from those allegations that her use and enjoyment of the area is more intense than that of the general public and, therefore, that she may be directly harmed in a way different in kind and degree from others, the court finds them sufficient to withstand dismissal (*see Matter of Save the Pine Bush v. Common Council of City of Albany,* 13 N.Y.3d 297, 890 N.Y.S.2d 405, 918 N.E.2d 917 [2009]). Like claims of specific environmental injury, injury to a petitioner's aesthetic and environmental well-being, activities, pastimes or desire to use and observe natural resources may also be found to state cognizable interests for purposes of standing (*id.*).

Id. 53 Misc 3d at 880

Appellant established that here use and enjoyment of public rights of way for walks that would be illuminated by new lighting is more intense than the general public. As such, Counsel Matsler is wrong when he states at page 12 of the Town's brief "the conditions created by LED streetlights are not unique to Appellant but are shared by the public generally." Cases quoted by Town Counsel Matsler are inapposite: Petitioner did not demonstrate use of area she is concerned with in *Sheive v. Holley Volunteer Fire Company, Inc.*, 170 A.D. 3d 1589 (2019). Kindred v. Monroe Cnty., 119 A.D.3d 1347, 989 N.Y.S.2d 732 (2014) involves a four-day festival that is temporary.

Justice Vazquez-Doles misapprehended the point and erred when she stated at R0009 (¶3),

> Being in the habit of taking walks at night or having an electromagnetic sensitivity is not enough to establish standing

To begin with, they are two separate issues (Appellant's walks at night that expose her to more LED light than others would get and her electromagnetic sensitivity); Her Honor's conclusion makes it such that no person would have standing to challenge anything related to LED streetlighting,

Furthermore, the Town cites to no case law that shows she must provide definitive proof of electromagnetic sensitivity. In *Sierra Club v Village of Painted*

Post, supra mere allegations of train noise were sufficient to confer standing. Petitioner did not have to prove that they suffered from a sensitivity to train noise. Electromagnetic sensitivity is recognized by the Department of Labor as Appellant demonstrated and as an Americans with Disabilities' Act disability by the United States Access Board, a federal agency.

The Town of Highlands is engaging in a textbook case of attempting to insulate itself from review pursuant to *Sierra Club v Village of Painted Post*, supra…. having tried to insulate itself from review by citing to the Governor's congratulations to the towns that did rollout LED lights, and having tried to insulate itself from review by claiming that an unchallenged non-action which could not be reviewed under SEQRA…. precludes Appellant from getting any *actual actions* reviewable under SEQRA. "Standing principles, which are in the end matters of policy, should not be heavy-handed (*Matter of Sun–Brite Car Wash*, 69 N.Y.2d at 406, 413 (1987).

With its comment on page 19 of the Town's brief referring to "Appellant's self-proclaimed status as an expert", *even if she were not* a recognized expert[14], the Town has shown its hand- that it will avoiding reviewing the conclusions in her briefing book and the scientific journals documenting Appellant's contentions, if

14 In any event, Appellant is a review editor at the journal *Frontiers in Public Health*, where she is one of a number of reviewers who approve or reject scientific studies by MD's and PhD's.

the Courts will permit it to do so. The Appellant's no expert, they say; but they do not want to ever have to review the damning evidence she presented, which anyone can bring to their attention.

Appellant has done the actual work that all government agencies and quasi-corporate NYPA are trying to avoid in the name of supposed energy efficiency.

The Town must be lead agency in any future endeavor and should not be permitted to use this challenge as an end-run around performing that review. Nor should the streetlight fixtures avoid review herein; they are the first step in an overall project, yet to be defined.

It is not speculation that any LED lights which are contemplated to go into the newly purchased fixtures in the future are harmful to humans; absent performing a review, the Town cannot make the conclusory assertion that the harm is speculative, particularly after Appellant meticulously demonstrated actual scientific proof of harm at R37-59 (Briefing Book); R60-R342- Exhibits to same with sources from *Scientific American* to Harvard, which is more than enough to trigger the Precautionary Principle. See again Appellant's moving brief, at footnote 18.

Appellant did demonstrate special harm for those afflicted with electromagnetic sensitivity such as herself. Appellant's injuries are not speculative

because those afflicted with electromagnetic sensitivity are supposed to avoid LED lighting to avoid worsening their condition (The Department of Labor recommends the removal of irritating lights for such individuals (R1126-R1128)) and she has had to curtail her walks in places that do have bright blue-white LED lights as a result of same. See also footnote 14, Appellant's moving brief (United States Access Board).

It is common knowledge that humans differ in their sensitivities; certainly, the Court is aware of some family members or colleagues who complain about LED headlamps on cars if not the streetlights themselves, whereas others are not so susceptible to irritation. Petitioner-Appellant clearly falls in the more highly affected category.

Finally, Respondent Town misses the point of the significance of Appellant's expertise. *Fleischer v. New York State Liquor Auth.*, 103 A.D.3d 581, 960 N.Y.S.2d 395 (2013) permits Appellant to assert claims of other rightholders, where it is impossible for the rightholder to assert his or her claims. The Access Board classifies people severe electromagnetic sensitivity as disabled, and this marginalized group of people are hard-pressed to advocate for themselves; Appellant Kopald is objectively unusual in her ability to argue and advocate notwithstanding her own affliction.

CONCLUSION

WHEREFORE, it is requested the challenged Decision and Order should be vacated and reversed and the relief requested be granted in its entirety, including costs of this appeal, and lower court filing and service costs, together with any other further relief this Court may deem just and proper.

Dated: Fort Montgomery, NY 10922
September 16, 2022

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